Yap Kim Kee v Wong Heng Kit

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2 (S1)–24–200 OF 1999
KAMALANATHAN RATNAM J
19 APRIL 2000

Civil Procedure *— Parties — Joinder of parties — Action not representative in nature — Plaintiff did not join other beneficiaries as plaintiffs — Whether non compliance of O 15 rr 6(2)(b)(i) and r 12(1) of Rules of the High Court 1980 — Rules of the High Court 1980 O 15 rr 6(2)(b)(i) & 12(1)*

The plaintiff applied to remove two private caveats lodged on land held under Geran No 26266, Lot No 3957 and under Geran No 26271, Lot No 3963 both in the Mukim of Kuala Lumpur ('the properties'). The properties were registered in the name of one Tan Cheng Soon ('Tan') as trustee for four beneficiaries. The plaintiff was one of the four beneficiaries. On 15 April 1997, the defendant entered private caveats over the properties. The defendant averred that Tan had through an estate agent offered the properties for sale and that the defendant had made payments (earnest deposit) to the estate agent towards the purchase of the properties. The plaintiff denied the defendant's contention that Tan had the consent of the beneficiaries to effect the sale. Counsel for the defendant contended that the plaintiff could not institute these proceedings without joining the other beneficiaries as parties to the action pursuant to O 15 r 6(2)(b)(i) and O 15 r 12(1) of the Rules of the High Court 1980.

Held, dismissing the application:

The plaintiff was one of the beneficiaries but he did not join the other beneficiaries as plaintiffs nor was the action brought as a representative action. The plaintiff has neither complied with O 15 r 6(2)(b)(i) nor O 15 r 12 of the Rules of the High Court 1980. There is no necessity for the court to go into the merits as the preliminary objection was successfully raised (see p 752B–D); *Eh Riyid v Eh Tek* [1976] 1 MLJ 262 followed.

[Bahasa Malaysia summary

Plaintif telah memohon untuk membatalkan dua kaveat persendirian yang dimasukkan ke atas tanah di bawah pegangan Geran No 26255, Lot No 3957 dan di bawah Geran No 26271, Lot No 3963 kedua-duanya di dalam Mukim Kuala Lumpur ('hartanah-hartanah tersebut'). Hartanah-hartanah tersebut telah didaftarkan atas nama seorang bernama Tan Cheng Soon ('Tan') sebagai pemegang amanah bagi empat orang benefisiari. Pada 15 April 1997, defendan telah memasuki kaveat-kaveat persendirian ke atas hartanah-hartanah tersebut. Defendan menegaskan bahawa Tan telah melalui ejen hartanah menawarkan hartanah-hartanah tersebut untuk jualan dan

bahawa defendan telah membuat pembayaran-pembayaran (wang cengkeram) kepada ejen hartanah tersebut terhadap pembelian hartanah-hartanah tersebut. Plaintif menafikan penegasan defendan bahawa Tan mempunyai kebenaran benefisiari-benefisiari tersebut untuk melaksanakan penjualan. Peguam bagi pihak defendan menegaskan bahawa plaintif tidak boleh memulakan prosiding-prosiding ini tanpa menyertai benefisiari-benefisiari sebagai pihak-pihak kepada tindakan tersebut selaras dengan A 15 k 6(2)(b)(i) dan A 15 k 12(1) Kaedah-Kaedah Mahkamah Tinggi 1980.

Diputuskan, menolak permohonan tersebut:

Plaintif merupakan salah seorang benefisiari-benefisiari tersebut tetapi beliau tidak menyertai benefisiari-benefisiari yang lain sebagai plaintif-plaintif mahupun memulakan tindakan tersebut sebagai satu tindakan wakil. Plaintif tidak mematuhi A 15 k 6(2)(b)(i) mahupun A 15 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980. Tiada keperluan bagi mahkamah meneliti merit-merit tersebut kerana bantahan awal telah dibangkitkan dengan jayanya (lihat ms 752B–D); *Eh Riyid v Eh Tek* [1976] 1 MLJ 262 diikut.]

Notes

For cases on joinder of parties, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3296–3321.

Cases referred to

Eh Riyid v Eh Tek [1976] 1 MLJ 262 (folld)

Legislation referred to

National Land Code 1965 ss 323, 329(1)
Rules of the High Court 1980 O 15 r 6(2)(b)(i), O 15 r 12(1)
Rules of the Supreme Court 1957 O 16 r 1, O 16 r 9

SK Lam (*SK Lam, Wong & Yap*) for plaintiff.
H Kanda (*Peter Yip & Yong*) for the defendant.

Kamalanathan Ratnam J:

The application

This is the plaintiff's application to remove two private caveats lodged on land held under Geran No 26266, Lot No 3957 in the Mukim of Kuala Lumpur (the first property) and under Geran No 26271, Lot No 3963 in the Mukim of Kuala Lumpur ('the second property') and for payment of compensation under s 329(1) of the National Land Code 1965 ('the NLC') to be assessed and to be paid by the defendant with costs. There was also a prayer for such further and other relief that the Court found reasonable to award.

Facts

The said first and second properties ('the properties') were registered in the name of one Tan Cheng Soon ('Tan'). By a deed of trust dated 6 March 1973 the said Tan confirmed that the said properties were registered in his name as trustee for four beneficiaries, namely:

(1) Tan Voon Kim (30% shares)

(2) Yap Kim Kee (45% shares)

(3) Loh Tian Loke @ Low Tian Loke (5% shares)

(4) Koo Seong How (20% shares)

in the respective shares appearing against their names. It was also a term, inter alia, of the trust deed that the trustee holds the said properties in trust for the named four beneficiaries and that he would transfer, charge, lease or otherwise deal with the said lands as the beneficiaries would direct, provided that all costs of and incidental to such dealings be borne and paid for by the said beneficiaries. The plaintiff herein is one of the four names beneficiaries. Even before the creation of the said trust deed the said Tan had executed the Form 14A when he received the said properties from the developer, as trustee.

On 15 April 1997, the defendant entered private caveats over the said properties. The reason stated in the Form 19B pursuant to s 323 of the NLC for entering the caveats was that he had paid an earnest deposit of RM4,000 on 4 October 1997 towards the purchase of each of the said two properties. There was however no sale and purchase agreement annexed. The plaintiff however averred in his affidavit in support of the application to remove the caveat, that to his knowledge no beneficiary, including himself, had authorised the sale. However, when the plaintiff's solicitors wrote to the defendant's solicitors to enquire who the alleged vendor was of the said properties, the defendant's solicitors replied that the said vendor was Tan who had passed away before the execution of the sale and purchase agreements.

In his reply affidavit (encl 10) the defendant averred that the said Tan has put in the market, through an estate agent named Mohd Nor & Partners Sdn Bhd, the said properties for sale and that he had on or about 8 April 1997 made the said payments referred to earlier, to the said estate agent, towards the purchase of the said properties. The said Tan had informed him at subsequent meetings that he had had the consent of the beneficiaries to effect the said sale. Whilst the sale and purchase agreements were being prepared the said Tan even allowed him to take possession of the first property since the defendant's land adjoined the said first property. He has since been paying the assessment and quit rent towards the said property.

In his reply, the plaintiff averred that to his knowledge neither Tan nor the beneficiaries had appointed the said estate agents to effect the said sale. He also denied the contention that Tan had the consent of the beneficiaries to effect the said sale. He also contended that the defendant had no authority to enter into possession of the first property.

Findings of the court

At the outset, Ms Kanda for the defendant raised a preliminary objection. He contended that the plaintiff could not institute these proceedings without joining the other beneficiaries as parties to the action. I agree. O 15 r 6(2)(b)(i) and O 15 r 12(1) of the Rules of the High Court 1980 ('the RHC') are the relevant rules. They read as follows:

O 15 r 6(2)(b)(i):

> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —
>
> ...
>
> (b) order any of the following persons to be added as a party, namely —
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> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
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> ...
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> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

O 15 r 12(1):

> (1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

In *Eh Riyid v Eh Tek* [1976] 1 MLJ 262, the then Federal Court had to consider an almost similar issue. At that time it was the Rules of the Supreme Court 1957 that applied and the equivalent rules were O 16 r 1 and O 16 r 9. I can do no better than cite a passage from the judgment of Raja Azlan Shah FJ (as his Highness then was) at p 263. This is what his Lordship said:

> To my mind, where as here there are four persons with individual rights of their own, there are two ways in which actions may be brought to establish their respective rights in one and the same action. One is to resort to O 16 r 1, by joining all of them as plaintiffs; the other is under O 16 r 9 by one named person bringing a representative action in respect of himself and numerous other persons. ... The policy of O 16 r 1 is to prevent repetition of cases of the same character and to save unnecessary expense. The plaintiffs are joined together by consent and are endowed with the status and responsibilities of ordinary litigants, for example, are liable for costs if they fail, and can be ordered to give discovery or to answer interrogatories.

Further down the page his Lordship said:

> ... Under that rule (O 16 r 9) the plaintiff, a named person, may institute proceeding without joining the other beneficiaries. But he must as the rule requires bring the action in a representative capacity. It is in my opinion not correct to interpret the rule as implying that it allows a person to bring an

> action without stating on the writ that he brings it in a representative capacity. That interpretation offends the language of the rule and the authoritative statements given to it and I can find in none of them the slightest justification for bringing a representative action under such circumstances as in the present case.

In *Eh Riyid* the plaintiff had brought an action to correct an error in the land register. The land belonged to the plaintiff's grandmother. The plaintiff was one of the beneficiaries of the estate of the grandmother but he did not join the other beneficiaries as plaintiffs nor was the action brought as a representative action. On a preliminary objection, the learned judge of the High Court dismissed the action and the Federal Court dismissed the appeal.

I would adopt the same principle here. The plaintiff in the case before me has neither complied with O 15 r 6(2)(b)(i) nor O 15 r 12 of the RHC.

Mr Lam's arguments were based on the ground that his client was an 'aggrieved party' pursuant to s 329 of the NLC. That goes to the merits of the case. Mr Lam must first cross the preliminary hurdle placed before him by the defence. To my mind, the plaintiff has stumbled. There is no necessity for me to go into the merits.I was satisfied that the preliminary objection was successfully raised and I therefore dismissed the appeal with costs.

Preliminary objection allowed. Appeal dismissed with costs.

Reported by Benjamin Yong

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